# United States
# Circuit Court of Appeals
## FOR THE NINTH CIRCUIT

in the Matter of W. N. RUSSELL, Bankrupt.

THE SCANDINAVIAN AMERICAN BANK OF BIG TIMBER, MONTANA, a Corporation,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt, W. N. RUSSELL, doing business under the name of W. N. RUSSELL LUMBER COMPANY, and W. N. RUSSELL, as an individual,

Respondent,

BRIEF OF PETITIONER.

CHAS. W. CAMPBELL, and
MILLER & O'CONNOR & MILLER,
Attorneys for Petitioner.

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## BRIEF OF PETITIONER.

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Statement of the case:

On the 29th day of June, 1915, W. N. Russell made and executed a chattel mortgage covering a stock of goods, consisting of coal, lime, cement, paints, oil, lumber and building materials to the Scandinavian American Bank of Big Timber. The mortgage contained a clause to the effect that the mortgagors could sell, in usual course, for cash, or credit not exceeding thirty days; that they would keep accurate accounts of sales and that they could deduct from the proceeds thereof their living expenses, business current expenses and could replenish the stock of goods, and deposit the net, daily, with, and to the credit of, the bank for application to the discharge of the mortgage debt and account monthly to the bank for the

sales and collections of the previous month. The mortgage was given to secure a note in the sum of $2,790.90, payable to the bank. On the 15th day of March, 1916, Russell was adjudicated bankrupt, and prior to the creditors' meeting the bank filed proof of it's preferred claim with the referee in bankruptcy. Thereafter objections were filed on the part of the creditors to the allowance of the bank's claim as a preferred claim. The grounds of objections were: First, that the mortgage was taken by the bank to delay and defraud other creditors of the bankrupt; Second, that the provisions relating to accounting, etc., were not complied with and that by reason thereof the claim should not be allowed as a preferred claim.

A hearing was had upon the objections and they were sustained. An appeal was taken to the Federal Court of Montana and the referee's decision was affirmed. Thereafter this petition to reverse the District Court's judgment was filed in this Court.

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## ASSIGNMENT OF ERRORS.

1. The Court erred in finding the objections made to the allowance of the bank's claim as a preferred claim sustained by the evidence.

2. The Court erred in finding that the parties intended the mortgage to protect them from interference from other creditors and to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee.

3. The Court erred in holding the mortgage in question

invalid.

4. The Court erred in affirming the findings of fact and order made by the referee holding the mortgage invalid.

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## ARGUMENT.

The mortgage in question was made in good faith to secure the amount named therein. The amount which was secured thereby had been, prior to the execution of the mortgage, loaned to the bankrupt, and when the mortgage in question was taken by the bank it was given as security to renew a debt which had been previously incurred and which had been secured by a mortgage given previous to the one in question. (Trans. p. 64.)

> "Mr. Russell had borrowed money from us from time to time, and we had quite a number of notes in the pouch and practically all of them were past due, and knowing Mr. Russell's condition, that he was owing quite a bit besides what he owed us, we got Mr. Russell in there one day and took a note for the full amount of his indebtedness to us at that time, which was also secured in chattel and real estate mortgage, and told him that we would be willing to carry him for this money; that we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was done, and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business." (Trans. p. 72.)

> "Q. This note of $4,165 was given, was it not, to take up those notes?
>
> A. Yes, it was taken in renewal and he got additional money at that time.
>
> Q. Now, then, did the $4,165 cover, at the time, the note was given, all of the indebtedness at that time?

A. All with the exception of the note that he had signed with his brother."

As a matter of fact in the testimony referred to, it is very apparent that the bank was attemping to aid the bankrupt in the paying of creditors including it, rather than seeking to delay or defraud other creditors. The real estate mortgage, which was given at the same time to secure the principal sum of $1830.00 was held by the referee to be a valid and subsisting mortgage and entitled to a place as a preferred claim. This circumstance shows that both mortgages were originally given in good faith.

Chattel mortgages, such as the one in question authorizing the mortgagor to sell his stock of goods in the usual course of business are held valid. Etheridge vs. Sperry et al, 139 U. S. 66. 35 Law. Ed. 171.

(Mont. case) Also, Noyce vs. Ross, 59 Pac. 369. 47 L. R. A. 400

Thus we find at the outset that the chattel mortgage in question created a valid lien in favor of the bank. Provided, of course, it was not given with intent to hinder, delay or defraud creditors. And the burden of proof is clearly upon the objectors in this case to show that the mortgage was taken in bad faith. There is no evidence in the record supporting this claim.

The most that can be said is that the cashier of the bank (Trans. p. 64.) knew of the condition of the bankrupt and he later says that he did not know the bankrupt was insolvent at the time of the taking of this mortgage. (Trans. p. 81.)

"Q. I will ask you, Mr. Moe, was W. N. Russell insolvent at the time this mortgage of $4,165 was made?

A. Not to our knowledge."

Of course had the bank known that Russell was bankrupt it would have been the height of foolishness for the bank to take a new mortgage at that time, whereas it already had a valid and subsisting mortgage upon the goods which were given as security for the payment of the notes that were then due. Had the bank known of the insolvency of Russell, would it not then have foreclosed its mortgage on the stock of goods which Russell had? He had insurance upon the same to the amount of $5,200.00. The bankrupt at that time had assets amounting to $8,000.00; a six thousand dollar stock of goods and real estate to the value of $2,000.00. (Trans, p. 81.)

Referring back to the old chattel mortgage there is nothing in record to show that these mortgages had not been given more than four months prior to the time of their renewal by the giving of the chattel mortgage in question.

Speaking of the burden of proof in the case; the rule is laid down in 20 Cyc. 108: "Fraud is never presumed but must be affirmatively proved. On the contrary the presumption, if any, is in favor of innocence; and according to general principles elsewhere discussed, the burden falls on him who asserts fraud, whether he be the plaintiff or defendant, to establish it by proving every material element of the cause of action by a preponderance of the evidence. This rule is laid down as the unanimous support of the cases:

Levy vs. Scott, (Calif. case) 46 Pac. p. 892. Fox

vs. Hale and Norcross Silver Min. Co., et al. 53, Pac. 32.

The latter case uses the following language:

"The burden of proof of the whole issue is still with the plaintiff."

In Conrad vs. Nicoll, 4 Pet. 291, the Supreme Court of the U. S. lays down certain rules as a proof of fraud which have been often followed since; First, actual fraud is not to be presumed; Second, if the act may be attributed to an honest motive equally as to a corrupt practice, the former is preferred. Third, if the person against whom fraud is alleged should be proved to be guilty of it in any number of instances, still if the particular act sought to be avoided be not shown to be tainted with fraud it cannot be affected by the other frauds, unless in some way it be connected with or form a part of them. Numerous decisions might be cited affirming the principles announced by the Supreme Court of the U. S. but we feel it unnecessary to burden this Brief with such citations.

Evidence which give rise to a suspicion of fraud or when it shows merely carelessness or negligence is not sufficient.

Lindsay vs. Kroeger, et al. 95 Pac. 839 (Mont. case.)

The Court says that a contract admittedly valid on its face cannot be avoided by a party to it on the ground of fraud or misrepresentations, except by allegation and proof of facts showing that he had been misled to his prejudice. So it is clear that the bank was not actuated by fraudulent motives either at the time the mortgage was given or later, while the bankrupt, Russell was conducting business under its terms, the latter alternative we will take up later.

In this connection it might be well to call the Court's at-

tention to the presumption which has been written into the Montana Codes; that a given relation which has once been shown to exist will be presumed to continue as long as it is usual with relations of that nature, or until a change has been affirmatively proved. The relations of the parties with reference to good faith originally has never been questioned, referring to the time the loan was originally made. Their relations are said to be fraudulent at the time the chattel mortgage in question was given. If their relations on the beginning were in good faith it would be presumed that their relations would continue to be in good faith as to their creditors, until such presumption was overcome by clear, positive and convincing proof.

Taking up the proposition that Russell did not account to the bank as was provided for in the mortgage:

The Court will observe that under the terms of the mortgage the mortgagor had the right to keep the necessary proceeds to pay current bills, and expenses of carrying on the business of lumber dealing and for making change and his actual and necessary living expenses, and that after such deductions were made if there was any surplus to deposit that in the bank to be applied upon his indebtedness to the bank.

(Trans. p. 318 to 320.)

"Mr. O'Connor.—Q. You're familiar with the provisions of this mortgage, Mr. Moe?

A. Yes, sir.

Q. According to the terms of the mortgage, he was to pay over to the bank any funds that were left from the pro-

ceeds of the sale of his stock and merchandise after deducting the actual and necessary expenses of carrying on said lumber business, actual and necessary living expenses of the party of the first part, Mr. Russell, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission as hereinafter given; and further given the right to buy new supplies of coal, lime, cement, paints, oils, lumber and building material—Question objected to, but overruled.

A. There were not.

(Trans. p. 321-22.)

Q. There was nothing to apply on your mortgage? That's what you mean?

A. He did not have any after he'd deducted the expense of the yard, purchases, etc.

Q. He did not?

A. No, sir.

Q. How do you know?

A. He stated so a great many times."

Confessedly, if there was nothing left after these deductions were made to deposit with the bank there would be no failure on the part of Russell and the bank to observe the provisions of the mortgage.

It must be borne in mind the bankrupt was engaged in farming, stock raising, doing team work and the lumbering business at Springdale, as well as in Big Timber, and that the proceeds from all of this work and various business were deposited with the money from sales of goods covered by the

mortgage.

(Trans. p. 204-5-6-7.)

In connection with the expenditures of which complaint has been made, namely:

$55.00 to Utermohl.
$15.00 to Oliver Typewriter Concern.
$52.49 concerning an automobile.
$40.00 for insurance.
$10.00 for Chautauqua.
$25.00 paid to Joe Meister.

Will say, that according to the undisputed record these items could not amount to the amount of money received by the bankrupt from sales of live stock, his team work and his ranching, assuming for the sake of argument that these items were not for living expenses or in anywise connected with the lumbering business.

Russell tells the Court that he did not receive enough money from all of his business to run the business.

(Trans. p. 215.)

"Q. Did you deposit to the credit of your individual account all the moneys which you received in the course of your business with cash or credit sales?

A. Yes, there would be very little exceptions.

Q. What were those exceptions?

A. A bill of five dollars or less, oftentimes paid out in cash from cash received, but the greater portion of this money was turned in to the bank to be checked out. Any money received, though, went back into the business.

Q. What were those small sums paid out for?

A. Well, living expenses; there was small sums paid out

right along for those. And now and then a hired man probably worked a day or two days. And such things as that.

Q. Were all these sums paid out necessary incidentals of the business and of your living expenses?

A. Yes, sir.

Q. Did you at any time between the 29th day of June, 1915, and the time when the petition in bankruptcy was filed, have any profits from this business in excess of your necessary living expenses and then the expenses incident to the running of your business?

A. No, I didn't have enough to run the business.

Q. Then, you did not have at any time during the continuance of the lein—of this mortgage, any moneys which you could apply on your notes to the bank?

A. I did not.

Q. Did you at any time during the continuance of this mortgage tell the cashier or any other officer of the bank that fact?

A. Yes, sir.

Q. When and how many times, if you know?

A. Well, at least twice a month. They would generally ask me when I was making deposits. Of course I generally had a place for it, a bill to be paid, when the money was deposited.

Q. You made verbal representations then to the bank or its officers, at least twice a month?

A. Yes, at least that.

Q. Weren't there several times also when you were in the bank, and oftener than twice a month, when you made verbal

reports of the status of your business.

A. Yes, sir.

Q. Did you tell them at any time the exact amount of money that you were owing prior to the first day of February, 1916?

A. No; I do not really believe I ever run the entire indebtedness up together myself. For myself.

Q. Then you did not know yourself how much you were in debt?

A. Not to a cent.

Q. As a matter of fact, under the system of bookkeeping or accounting which you had there, was it possible for you to have made better accounts to the bank from what you did?

A. No, sir.

Q. Did you ever turn any money into the bank you'd applied on your $4,165 note?

A. No, sir.

Q. Did you on any other notes after that?

A. Yes, sir."

So it is clearly established that no money was received by Russell in excess over and above the deductions. The mortgage authorizes him to take out of his business these expenses and if this is the situation there were no proceeds improperly applied or used by Russell, with the consent of the bank or otherwise, that should have been paid upon the principal of the note secured by the mortgage, consequently no failure in the terms of the mortgage has been shown in this respect.

WITH REFERENCE TO THE ACCOUNTING FEATURE:

Statements were made by Russell to the bank as to his condition at least twice a month. (Trans. p. 215 to 217.)

(Trans. p. 228-29.)

"Q. Did Mr. Moe ever ask you what you were doing with the money taken in every day and the profits of your business?

A. Yes, sir.

Q. Where did you tell him they were going to?

A. I told him it was taking all that was coming in to keep up my stock and keep going, which it was doing. I was holding out too much credit which I found out afterwards was impossible to do, and he told me so at the time.

Q. When did he tell you that?

A. Probably once or twice every month when he thought I should be advised to back off on giving so much credit a little bit."

Some point was made in the Court below as to Russell's selling goods on credit. We have his statement on page 229 of the transcript to that effect. As a matter of fact he made it a point never to give a man over 30 days credit, and as he found out 30 days meant anywhere from 30 days to never, and this is an emphatic statement by Russell himself, that he did not sell goods on credit for a greater time than 30 days. (Trans. p. 229.) His testimony was not contradicted in any way. An attempt was made by reference to the accounts kept on the McCaskey Register to show that Russell gave credit for

indifinite terms, yet these accounts show nothing of the kind, from all the books introduced in evidence at the hearing it is shown clearly that Russell's bills receivable were payable to him monthly. This is ordinary business usage and accordingly any sales not for cash but silent as to the terms of payment cannot be construed otherwise than as a sale on credit until the first of the next month. To support this well established rule there is no need to cite at length from authority.

Cyc. Vol. 12, 1077, lays down this rule.

"So where there is no express contract the time of delivery, the time of credit, the time of payment and what shall be considered as a payment may be regulated by usage." No agreement on the part of Russell to extend the time of payment for more than 30 days was shown. The evidence does show attempts to compromise bad debts and to arrange for the payment of other accounts by delinquents who had defaulted, but this was good business and the evidence does not show a single case where an account which could have been collected sooner was carried for more than 30 days. The accounts which were carried are simply incidents of bad debts unavoidably incurred in the course of trade.

Russell's customers promised to pay within 30 days. The sales were made upon his reliance upon these promises. The subsequent default was no part of the credit given. Neither the bankrupt nor the bank can be blamed for their delinquency. Yet it is solely because of such defaults which occur in every business that the McCaskey register shows the uncollected balance complained of.

Any business operating on the same scale as was Russell's would show a similar total of bad debts at the end of eight months business and any authority to carry on business whether contained in a chattel mortgage, power of attorney or corporation charter was never given with the understanding that the business so authorized should be conducted entirely without the accumulation of bills receivable. It is a well known fact that all people do not pay their debts. Yet to hold Russell and the Bank accountable for every customer to whom he had in good faith extended credit within the terms of the mortgage, but who, for some reason best known to recalcitrant debtors, had refused to pay in accordance with his promise is to make the bank an insurer of the credit of every person with whom Russell dealt. This was not the intention of the parties as expressed in the mortgage. Again, if credit was extended beyond the 30 days, which was not the fact, the evidence does not show that the bank was a fraudulent party thereto.

The Circuit Court of Kansas in the case of Atchison Saddlery Co. vs. Gray, 64 Pac. 987, says:

> "That even tho proceeds were used in violation of the terms of the mortgage, such violation without the knowledge or consent of the mortgagee would not make void the mortgage as to it."

Also see, Howard vs. Wulfekuhler, 13 Pac. 566.

The case at bar cannot be distinguished from the Gray case except that in the Gray case the plaintiff carried on business at some distance from where the mortgagor lived, whereas in the case at bar, the bank and Russell were located in the same town.

An examination of the records of the transcript in this case will clearly reveal the fact that Russell kept a very imperfect record of his transactions and that it would be next to impossible for the bank to get information relative to his credits, etc.

In this connection the bank had a right to assume that Russell was carrying out his agreement and it was not incumbent upon the bank to install a new system of bookkeeping for Russell or to place an agent on the grounds to supervise the transactions. There was never, in the usual course of business in Big Timber, any suspicious incidents brought to their attention to lead the bank to infer that Russell was breaking his agreement, and it is doubly sufficient that nothing has been brought to light since and have been specifically pointed out by the attorney for the objectors.

Going back to the accounting feature:

The law does not require a formal statement of ones dealing to constitute an accounting. An accounting is defined in 1. C. J. 596, to be

> "A detailed statement of items of debt and credit arising out of contract or some fiduciary relation. To constitute an account there must be a detailed statement of the various items and there must be something which will furnish to the person having a right thereto, information which will enable him to make some reasonable test of its accuracy and honesty. It is accordingly insufficient merely to state a general balance. The particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different form, is unimportant."

This definition is based principally upon the law as laid

down by the Calif. Supreme Court, in the case of Millet vs. Bradbury. 109 Calif. 170.

It is admitted that Russell deposited the proceeds of his sales charged to his individual account with the bank. It is admitted that the money which Russell paid out in the course of his business was spent by means of checks drawn on his account. From this source of information it follows that the bank was able at all times to determine the financial standing of the bankrupt. The monthly balance showed every 30 days exactly where the business stood in receipts and expenditures, and according to the testimony heretofore quoted, the cashier of the bank several times a month would ask Russell how he was getting along, etc., which testimony the bankrupt admitted. (Trans. p. 216.)

The system used by Russell, namely the McCaskey system showed the accounts which Russell was carrying on the books, the volume of cash sales and collections, the withdrawals and expenditures of the business. If due consideration is had for substance and not for form, how could a formal statement, which counsel seems to think is demanded each month by Russell, have given the bank any more information than it already had. Could a detailed report by Russell have been better than checks and deposits from which the report would have had to be made? Russell testified that the only record he kept of the money he paid out was upon the stubs of his check book and by means of his cancelled checks. (Trans. p. 90.)

"Q. Did they ever ask you what your sales had been for

any particular month? How much paid out and collected and did you tell them?

A. Yes.

Q. Where did you get the figures from?

A. My check-book always showed what I was paying out.

Q. Now, then, did you keep any other books except your check-book as to what you were paying out?

A. No."

Could Russell's written conclusions have been better or more reliable than the information covered by the conferences by him and the bank officers, taking into consideration the fact that Russell was not a bookkeeper or accountant, that he was not schooled in figures or auditing and that he was not competent to draw up an account of his assets and liabilities, showing his costs, over-head expenses, profits and losses with the details required in the usual financial statement. Is it not enough that he put all receipts on record at the bank and made all expenditures by checks drawn thereon from which any business man accustomed to such matters could draw an accurate conclusion. The officers of the bank knew all along that Russell was not paying expenses, and the accuracy of their knowledge is plainly evidenced by the present proceedings in bankruptcy, a situation peculiar to gentlemen ~~in~~ and industries which do not pay expenses. With every deposit and withdrawal at the bank Russell was accounting to the party of the second part for all sales and collections. He was furnishing them with a detailed statement of items of debit and credit. He was providing them with a form which would enable them to make some

reasonable test of its accuracy and he was accounting every day for the proceeds of his business. He was keeping fully within the spirit of his agreement. Nothing which a formal statement by him would have shown was concealed. If Russell had practiced fraud a detailed report made out by him certainly would not show it. Detection could only have come from the other records which the bank constantly had before it. The fact that the records did not appear to have been kept by Russell in some particular mode is entirely immaterial.

Complaint was made in the Court below that large sums of money were deposited in the bank but none of it was applied on the mortgage debts. But the fact was overlooked that expenses had to be met; that the stock of goods had to be replenished; that the mortgagor had to live, all of which he had a right to do under the terms of the mortgage, and the fact was also likewise overlooked that there was never anything left, after deductions were made with which to reduce the mortgage indebtedness.

Russell being insolvent and a bankrupt shows that the business was not profitable. Had there been a surplus at any time after the expenses were deducted, Russell would not have become a bankrupt.

By reason of the relations of the continuous accounting between the bank and Russell, the bank knew there was no profit and nothing to apply to the satisfaction of the mortgage indebtedness.

The only inevitable conclusion to be drawn from the evidence that from the moment that the mortgage was given to the

date of the filing of the petition in bankruptcy Russell did not have one penny of profit to apply on the mortgage debt, and because of the fact that the bank knew of this condition, no deposit of the proceeds of such sales of the mortgagee herein to the credit of the party of the second part to apply on the note hereinafter mentioned, was ever made. There was never any surplus to apply. Russell's receipts from day to day and more were covered by his debts. These had to be met in part at least or go out of business.

Except the items that are mentioned in this Brief, every single dollar paid out by Russell was used to take up an honest debt. No court has ever before said that the payment of a just debt is fraud upon anyone; and the burden of proof is on the objectors to show that the provisions of the mortgage were violated, respecting the paying out of money which burden was not met by the objectors.

Exhibits from one to thirty-six are evidence of debts paid by the bankrupt, which were authorized under the terms of the mortgage. Had these bills not been paid, creditors would have then brought suits. The bank by the terms of the mortgage waived its lien to the receipts to this extent. To continue in business Russell must buy and sell, and in order to buy he must pay previous bills. Some of the bills he paid were incurred prior to the execution of the mortgage. Russell's debts before the mortgage continued to be Russell's debts after the mortgage. They were still the liabilities of the business. The mortgagee did not try to and could not have suspended payment of the debts incurred prior to June 29th, 1915. Failure to pay

for a car load of lumber sold to him on June 25th before the mortgage would have the same result as failure to pay for a car on July 5th after the mortgage. In either case he could not continue to buy unless he paid and if he could not buy he could not sell. But if this problem is viewed from another angle, it is difficult to see how these payments could prejudice the other creditors, who, but for them would have received nothing, and who are through the trustee objecting to the allowance of the bank's lien as a preferred claim, and are the people who received payments upon bills.

Counsel contention amounts to this: the mortgage in question would have been valid if the conditions thereof had been observed and if a formal statement had been rendered, which under the circumstances would not have benefited the bank nor the creditors. And again, if the formal statement had been rendered and these payments that have been objected to were paid to the bank, the bank would have then taken all of the assets of the business and the objecting creditors, who have already received payments and who are now objecting to this preferred line, through their trustee, would have received nothing, and because the bank allowed the mortgagor to pay some of these creditors contrary to the trustee's interpretation of the terms of the mortgage, and instead of taking all of the proceeds itself, it thereby committed fraud which should vitiate the whole mortgage lien. Had the bank played "whole hog" and given the general creditors nothing it's security would have been good. But by dividing between them the income of the business in order to keep Russell on his feet

and his business going the bank has been guilty of fraud, which subjects it to the penalty of giving the general creditors all that is left. By giving to these objectors nothing, the bank would have protected itself; by giving them pro rata payments from time to time in preference to its own debt it is thereby contended that the bank has lost all. Such an argument needs but to be stated to be refuted.

Further these payments referred to above to the creditors from whom Russell bought his supplies and his stock in trade and who would have stopped his business if he had not paid were made in strict conformity to the provisions of the chattel mortgage requiring that Russell should not let the value of his lumber and materials fall below a certain figure. Had the bank interfered and attempted to convert any of this money to the payment of their own claim there would have been room to cry fraud. The concerns who did sell to Russell when he was the owner of a six thousand dollar lumber business prior to June 29th, 1915, would have found after that date the entire assets of the business diverted to another and subsequently accruing claim.

Under those circumstances the objectors would holler fraud exactly as they are now arguing. Yet these same objectors are the very persons who benefited by the payments under the mortgage, which they are now questioning. Even if there had been fraudulent practice in this case, these creditors who have received the benefit thereof are in no position to raise the question. It is a familiar principle of equity in bankruptcy courts that one who alleges fraud and demands equity must himself use equity and deal with clean hands.

Every cent of the sum covered by the mortgage the bank paid Russell and he to the creditors. These creditors now appear in this case, represented by the trustee to object to the validity of the bank's security, while they hold in one hand the proceeds of the loan obtained from the bank by virtue of that security, while with the other they demand the security itself. A plainer case of equitable estoppal cannot be stated. Admitting every contention of the objectors to be true still the facts show that the objectors with full knowledge of the mortgage which was of record in Sweet Grass County, shared in every payment made in alleged violation of its terms. To such as these it is submitted the doors of this Court ought to be closed.

It may be contended that it would be in violation of the terms of the mortgage for Russell to have purchased merchandise on credit, but the concerns appearing here, through the trustee are the ones which allowed Russell credit and they certainly cannot set up as a violation of the terms of the mortgage which was on record, their own act and declare that by their own act they have been defrauded. The recording of the chattel mortgage was notice to these people. They cannot assist in the violation of the terms of a mortgage and then claim that by reason thereof they have been defrauded. By this means these creditors and objectors have been wilfull contributors to the alleged fraud which ought to put these parties beyond the jurisdiction of this court in this case. But even though the terms of the mortgage were violated in this respect it would not invalidate the mortgage unless the officers of the bank had notice and the record shows no such notice.

It is submitted on behalf of the bank that the objectors to the validity of its loan have failed to show a single instance of fraud on the part of the bank in the entire transaction and everything complained of may very easily be explained as a result of a desire to help the bankrupt continue his business.

The objectors who come into court here and complain of the bank's loan are the creditors who have shared the fruit of the loan made by the bank under the mortgage. It's alleged breach of its terms has been at their instance and solicitation. It is they who have shared every penny of the money taken in by Russell in the conduct of his business and from his teams and his farm and from the sale of his live stock. They took no steps to protect their own interest, they gave no notice to the bank and other creditors. The mortgage is recorded in Big Timber at a distance of less than 300 yards from the lumber yard run by Russell. If the bank in good faith has advanced money to Russell to keep his business going for some eight months these creditors have thrown him into bankruptcy and by so doing ended their chances of receiving payment in full. Yet they now ask the bank to hold the sack. They have taken all the proceeds of the business that they could reach with one hand, with the other they now ask a court of equity and good conscience to give them what is by right the bank's security. They make no offer of restitution; give no explanation for their own participation in the breach of the mortgage conditions, which they allege. If there ever was a case where clean hands are imperatively demanded in a Court of equity, this contest is one.

It is respectfully submitted that the objectors have failed to prove their allegations of fraud. That their own acts and statements have estopped them from questioning the mortgage and that the bank has proved its good faith in this matter and the consequent validity of its lien. Upon these grounds this court is respectfully asked to reverse the judgment of the District Court in Montana, and to sustain the validity of the chattel mortgage.

Respectfully submitted,

CHAS. W. CAMPBELL, and
MILLER & O'CONNOR & MILLER,
Attorneys for Petitioner.

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Due, legal and timely service of the foregoing brief and receipt of a true copy, is hereby acknowledged this..... day of October, 1917.

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Attorney for Trustee.